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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*,

v.

GENERAL ELECTRIC COMPANY, *Respondent*.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, International Union of Electrical, Radio and Machine Workers, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on December 27, 1968, said judgment holding, *inter alia,* that certain grievances arising under a collective bargaining agreement (hereinafter referred to as "National Agreement") between the parties and designated by them as National Docket Nos. 8290, 8427 and 8643, respectively, were not arbi-

trable, the writ to issue only in the event that this Court should grant the petition for a writ of certiorari in No. 1114 at this Term.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, printed in Appendix to Petition (pp. c - w) heretofore filed with the petition in *General Electric Company* v. *International Union of Electrical, Radio and Machine Workers,* No. 1114 this Term is reported in 278 F. Supp. 991. The opinion of the Court of Appeals, printed in Appendix A (pp. 27-53) to the petition in said case, No. 1114, this Term is not yet officially reported but is unofficially reported in 70 LRRM 2082.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1968. The jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether the Court below disregarded important aspects of national labor policy with respect to arbitrability as set forth by this Court in the *Steelworkers'* trilogy of cases[1] when it found that certain grievances, bearing National Docket Nos. 8290, 8427 and 8643, arising under the 1963 National Agreement between the parties, were not arbitrable, although the applicable collective bargaining agreement did not contain any clear and unambiguous exclusion of such grievances from arbitration.

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[1] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

STATEMENT

By a suit commenced under Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185, in the United States District Court for the Southern District of New York, the petitioner herein, International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter referred to as "Union"), sought to compel the respondent herein, General Electric Company (hereinafter referred to as "Company"), to arbitrate certain grievances which had arisen under applicable National Agreements between the parties.

On February 19, 1969, the District Court entered judgment granting the Union's motion for summary judgment and directing that arbitration be had of the grievances involved.

Thereafter, the Company appealed to the Court of Appeals for the Second Circuit from the judgment of the District Court with respect to seven of the grievances. On December 27, 1968, the Court of Appeals entered judgment (Appendix to Petition in No. 1114, pp. a - b), affirming the District Court as to four grievances and reversing the District Court as to the remaining three grievances which are the subject of this conditional cross-petition for a writ of certiorari[2] and which arose under the 1963 National Agreement between the parties.

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[2] The Company has heretofore filed in No. 1114 a petition for writ or certiorari as to three of the four grievances found to be arbitrable by the Courts below.

A. The 1963 National Agreement

Article XV, 1 of the National Agreement provides that *any* grievance which remains unsettled after having been fully processed through the contractually-prescribed grievance procedure and which involves either the interpretation or application of a provision of the Agreement or a disciplinary penalty shall be submitted to arbitration (Appendix B, Company's petition in No. 1114, p. 56). This language had been previously construed by the Court below in its consideration of earlier National Agreements between the parties and found to be the broad and comprehensive standard labor arbitration clause to which the principles enumerated in the *Steelworkers'* trilogy directly apply. *International Union of Electrical, Radio and Machine Workers* v. *General Electric Co.*, 332 F. 2d 485, 488 (2d Cir. 1964), cert. denied, 379 U.S. 928 (1964); *Carey* v. *General Electric Co.*, 315 F. 2d 499, 505 (2d Cir. 1963), cert. denied, 377 U.S. 908 (1964). The language of Article XV,1 is buttressed by Article XV, 6(a) which expressly states that arbitration as a matter of right includes only requests to arbitrate which involve disciplinary action, the claimed violation of the specific provisions of the National Agreement and the claimed violation of the provisions of a signed Local Seniority Supplement (Appendix B, Company's petition in No. 1114, pp. 61-62).

Article XV of the 1963 National Agreement is an expansion of the exclusionary language found in earlier National Agreements between the parties. Article XV.7 of the 1963 National Agreement (Appendix B, pp. 62-65) is the Section in which various exclusions from arbitration, except upon the Company's consent, are listed. Relevant to the consideration of National

Docket Nos. 8427 and 8643 is Article XV, 7(e) (Appendix B, p. 63) which excludes from arbitration, except upon the Company's consent, those arbitration requests which would require an arbitrator to consider, rule on or decide the appropriate hourly, salary or incentive rate at which an employee shall be paid. This exclusion is explained in a footnote to Article XV, 7(e) as designed to confirm the intent of Article VI, Section 1 and Article VI, Section 5 (first sentence) that "disputes over individual job classifications, rates of pay, incentive standards, etc. are assigned by the parties to local negotiations, and not to arbitration" (Appendix B. Pet. No. 1114, pp. 63-64).

B. The Three Grievances

In National Docket No. 8290, the Union challenged the Company's action in unilaterally changing hours without complying with the provisions of the agreement and in disciplining certain employees at the Company's Schenectady plant for their failure to return to work on November 25, 1963, after a two-hour suspension of operations in order to permit observance of a period of mourning during President Kennedy's funeral. The Company had unilaterally imposed the two-hour cessation of work and had further unilaterally ruled that employees must return to their jobs at the expiration of the two-hour period in order to receive wages for such two-hour period (A. 45).[3] Those employees who did not return to work after the two-hour period were disciplined by not receiving wages for that period during which work was suspended (A. 46). Article V, 1(c) of the National Agreement provides that the Company must give the Union at least

[3] Reference is to Appendix, filed below in the Court of Appeals.

one week's notice when a change is made in the hours of work or working schedules of substantially all employees of a plant (A. 78-79). The Company did not give a week's notice as required by the National Agreement, although it claims that it gave one day's notice to the Union (A. 67). This claim by the Company is set forth in its affidavit in opposition to the motion for summary judgment in the District Court and is made by the affiant Ritter who had nothing to do with the giving of the so-called notice and therefore could not testify to any facts concerning it (A. 67). The Company compounded its violation of Article V, 1 by the unjustified disciplinary penalty it thereafter imposed. The District Court held this grievance arbitrable stating (Appendix to Petition pp. n-o):

> "However one views the merits of the Union's alleged grievance arising out of the company's intended good will gesture, the fact is that the claim of violation of the workweek provision raises an issue, as does the claim that the nonpayment for the hours in question constituted a disciplinary penalty, of interpretation of specific provisions of the Agreement.
>
> "Moreover, one aspect of this grievance, the charge that the defendant imposed the suspension of operations unilaterally, presents an issue of fact going directly to the merits of the grievance. The defendant asserts that the suspension of operations had been put into effect only after it had been discussed with Union representatives and that their reaction was favorable. Whether such discussion was had, and, if so, whether the claimed reaction can be construed as consent or waiver of the workweek requirements, and further, whether it was within the authority of those officials is for the determination by the arbitrator—not by the Court."

Two of the judges[4] in the Court below stated that they were unable to comprehend how a proposal to pay for time not worked could become disciplinary action because it was conditioned on a prompt return to work (Appendix A, Pet. No. 1114, p. 53), while the third judge[5] who wrote the majority opinion with respect to the other grievances, dissented (Appendix A. Pet. No. 1114, p. 40) stating that a loss of pay may sometimes be regarded as disciplinary (Appendix A. Pet. No. 1114, p. 50). In light of the express direction in the National Agreement that disciplinary penalties are arbitrable as of right, he concluded that under the National Agreement the grievance was arbitrable (Appendix A. Pet. No. 1114, p. 51).

National Docket Nos. 8427 and 8643 are similar in that both these grievances allege the Company's violation of Article VI, 4 of the National Agreement.

Article VI, 4(a) defines the terms Standard, Special and Temporary piece prices as used in the National Agreement (Appendix B. Pet. No. 1114, p. 55). A Standard piece price is one where the manufacturing method has been established, while a Special piece price is one set on work which usually repeats infrequently or in small quantities or has some special feature or purpose (Appendix B. Pet. No. 1114, p. 55).

Article VI, 4(b) provides that there will be no change in a Standard piece price except where there is a change in manufacturing method (Appendix B. Pet. No. 1114, p. 55).

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[4] Judges Moore and Friendly.

[5] Judge Feinberg.

National Docket No. 8427 challenged the Company's failure to set a Standard piece price on a job which had been performed for a period of over 20 years (A. 50). The Union contended that at one time a standard price had been set on the job in question, but that thereafter there was a manufacturing methods change and the price was changed, and the Company returned to the prior manufacturing method but failed to reinstate the standard price (A. 51). The Union charged that the Company's action was a direct violation of Article VI, Section 4(b).

Similarly, National Docket No. 8643 challenged the establishment of a new pricing system with respect to a certain shear operation. The old price had been in effect for over 13 years (A. 61). The new price was not occasioned by a change in the manufacturing method (A. 51), and the Union contended that there was a violation of Article VI, 4 of the National Agreement. With respect to both National Docket 8427 and 8643 the district court ruled the grievances arbitrable stating (Appendix to Petition, p. s):

> "Despite the defendant's contention, the arbitrator, with respect to the dispute, is not called upon to consider, rule upon or decide an appropriate hourly, salary or incentive rate—these have already been determined by the parties. He is called upon to decide whether the classifications for piece prices, as defined by the parties under Article VI, Section 4, have been properly applied by the defendant, or, as plaintiff charges, whether the defendant, by an incorrect classification of a rate to a job, violated the terms of Article VI, section 4. The issue to be presented to the arbitrator is whether the piecework rates, as defined by the parties, have been applied by the defendant in accordance with the Agreement. Its determination

involves the interpretation or application of Article VI, section 4, and so is subject to arbitration."

With respect to both of these dockets the Court of Appeals reversed on the ground that the old piece price having always been designated by the Company as a Specialty piece price, Article VI, 4(b) did not apply (Appendix A. Pet. No. 1114, p. 39). In reaching its conclusion that National Docket Nos. 8427 and 8643 were not arbitrable, the Court below disregarded the contractually formulated definitions of Standard and Special piece prices set forth in Article VI, 4(a) (Appendix B. Pet. No. 1114, p. 55.

REASONS FOR GRANTING WRIT

1. The decision of the Court below with respect to the three subject grievances fails to follow the well settled principles governing judicial determinations of arbitrability in Section 301 suits as clearly enunicated by this Court in the *Steelworkers'* trilogy of cases. There this Court pointed to the National Labor policy to promote industrial stabilization through the collective bargaining agreement. *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). Recognizing that a major factor in achieving industrial peace is the use of the arbitration procedures often found in such agreements (*Id.* at 578) this Court held that all questions on which the parties disagree must be construed as within the scope of the grievance and arbitration procedures except where the parties agree specifically to exclude certain matters. *Id.* at 581. It was held that an order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitra-

tion clause is not susceptible of an interpretation that covers the asserted dispute and all doubts should be resolved in favor of coverage. *Id.* at 582-583.

In the case at bar, the arbitration clause begins with broad and comprehensive language, namely that *any* grievance involving either the application or interpretation of a provision of the National Agreement or the imposition of a disciplinary penalty is arbitrable as of right (Appendix B, Pet. No. 1114, pp. 56, 61-62). Thereafter, specific exclusions from arbitration, except if the Company consents to arbitration, are set forth. Disciplinary penalties, except if the employee has less than six months' service, are not excluded. Grievances arising under Article VI, 4 are not excluded, although grievances arising under Article VI, I and 5 (first sentence) are *specifically* excluded (Appendix B, pp. 63-64).

The Court below in holding that National Docket Nos. 8290, 8427 and 8643 were not arbitrable departed from the square ruling of this Court and beclouded a well-settled aspect of national labor policy.

In National Docket No. 8290, the majority in the Court below felt that the concept of "discipline" could not be extended to a situation where certain employees were made, willingly or not, to stop work for two hours and were then disciplined when they failed to return to work by not being paid for the hours not worked, although other employees who did return to work were paid for the two hours not worked (Appendix A. Pet. No. 1114, p. 53). The majority in stating that the term "discipline" could not apply to such a situation has resurrected the corpse of *International Association of Machinists* v. *Cutler-Hammer*, 271 App. Div. 917 (1st Dept. 1947), aff'd 297 N.Y. 519 (1947), which

this Court had buried in *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566-567 (1960). The majority below implicitly found that "discipline" as raised by the Union with respect to National Docket No. 8290 was clearly contrary to the plain meaning of the words and could not make an arbitrable issue. See *International Machinists v. Cutler-Hammer,* 271 App. Div. 917, 918 (1st Dep. 1947).

In National Docket Nos. 8427 and 8643, the Court below has similarly attempted to state what the plain meaning of certain provisions were, without considering the express contractual definitions. Thus, the Court below accepted the Company's designation of a Special piece price on the two operations involved, but did not measure the nomenclature used against the contractual definition of Special piece price found in Article VI, 4(a) (Appendix B. Pet. No. 1114, p. 55).

However, a construction of Article VI, 4(b) does not depend upon the designation of the piece price by the Company, but upon the nature of the piece price under the definitions of Article VI, 4(a) of the National Agreement. Where the Company has designated a piece price as Special, if that piece price when measured against the definitions in Article VI, 4(a) is found to actually be standard, the Company, in changing such piece price without a corresponding methods change, has violated Article VI, 4 of the National Agreement. The Court below, in disregarding this fact, has excluded two grievances from arbitration where these grievances involve the interpretation and application of the contract, which is arbitrable under the terms of the contract as of right.

2. The question presented is of importance in the formulation and implementation of national labor

policy since by its decision with respect to the three subject grievances, the Court below has disregarded the principles of the Steelworkers' trilogy. Such disregard for principles established by this Court can seriously affect the well-settled principles governing the critical aspect of arbitrability in national labor policy.

3. Although the Union feels that the action by the Court below raises an important question in the field of industrial relations, inasmuch as the three subject grievances raise questions with respect to a specific collective bargaining agreement which might not be deemed sufficiently important to warrant an independent petition for certiorari, the Union has filed this conditional cross-petition. If the Court determines to grant the Company's petition in No. 1114, we believe it should review the entire case and correct the plain error of the Court below with respect to this aspect of national labor policy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in the event the Court should grant the petition for a writ of certiorari in No. 1114, this petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

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